IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1692

JOHN DAVID MOORE, JR.,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1975

No.

JOHN DAVID MOORE, JR.,
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versus

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioner, JOHN DAVID MOORE, JR., respectfully prays a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on March 9, 1976.

OPINIONS BELOW

The Findings of Fact and Conclusions of Law of the District Court for the Western District of Texas, El Paso Division, are not officially reported, but appear in Appendix D hereto. The opinion of the Court of Appeals was not reported, having been stamped: DO NOT PUBLISH; however, this opinion appears in Appendix G hereto. A copy of the order denying the Petition for a Rehearing en banc, entered April 22, 1976, appears in Appendix H hereto.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on March 9, 1976. A Petition for a Rehearing en banc was timely filed and an order denying the Petition for a Rehearing en banc was entered on April 22, 1976. This Petition for Certiorari was timely filed within thirty (30) days of that date. This Court's jurisdiction is invoked under Title 28, United States Code, Section 1254(1).

QUESTIONS PRESENTED

I.

Whether an accused may be properly convicted of possession of narcotics where the evidence revealed only his presence with another at the residence where the contraband was seized, without additional showings of occupancy, control, or other affirmative links.

II.

Whether the hearsay tip of an unidentified informer contained in the affidavit of the search warrant may properly be used by the Government in its final argument for conviction, and by the Court in its Findings of Fact and Amended Findings of Fact supporting conviction, especially in the instant case where the Government opposed disclosure and the Court denied disclosure of this same unidentified informant.

CONSTITUTIONAL PROVISIONS INVOLVED

The following pertinent portion of the Fifth Amendment to the Constitution of the United States:

> "No person shall be . . . deprived of life, liberty, or property, without due process of law, . . ."

and the following pertinent portion of the Sixth Amendment to the Constitution of the United States:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . ."

STATEMENT OF FACTS

On January 7, 1975 a warrant to search Apartment No. 60, Hill Country Apartments, El Paso, Texas was issued to Federal narcotics agents on the strength of a hearsay tip from an unidentified informer that one John David Moore and others were possessing heroin and residing at the apartment. Entry was made into the apartment that same day. John David Moore and Isabel Cueva were arrested within the apartment and a large amount of heroin was seized. Before trial at the United States District Court, defense counsel made two motions: (1) that the evidence should be suppressed because the search was unconstitutional; and (2) that identity of the unnamed informant should be disclosed. At time of trial, the case against Isabel Cueva was dismissed on the motion of the Government. John David Moore proceeded to trial on a plea of not guilty. The motions for suppression and disclosure were carried through this trial on the merits.

The trial produced no other evidence than the fact that John David Moore was present at the time of the search and arrest. At one point during the trial the

Government made one attempt to show an affirmative link; however, it was fruitless.

> Q. "... Did you find any indication of ownership of the apartment?
> A. No, Sir, I don't believe I did" (Tr. 53)
> (Appendix B)

At the conclusion of the trial both sides made their final arguments. The Government relied heavily on the informer's designation of Moore as the resident of the apartment and the possessor of the heroin in its argument that it had proved guilt beyond a reasonable doubt. (Appendix A) The Court overruled the Defendant's motions and found the Defendant John David Moore guilty of possessing heroin with intent to distribute, sentencing him to confinement for six years and to a special parole term of six years. John David Moore has been and is now in the La Tuna Federal Correctional Facility in Texas. In support of its judgment and conviction the District Court issued Findings of Fact and Conclusions of Law (Appendix D). The Findings of Fact included references to the unidentified informant's assertions in the Finding of Fact No. 12 which concerned the "occupancy" of the apartment.

> "Information revealed by the confidential informant and relied upon in preparation of the affidavit disclosed that JOHN DAVID MOORE was the occupant of apartment #7, Hill Country Apartments, 213 Argonaut, El Paso, Texas."
>
> (Appendix D)

Over the objections of defense counsel, the Court refused to excise the hearsay portion and revised the

wording of Finding No. 12 so that the hearsay allegations were even more deeply embedded in the proof of guilt.

> "Information revealed by the confidential informant and relied upon in the preparation of the affidavit disclosed that John David Moore was the occupant of Apartment 60, Building No. 7, Hill Country Apartments, 213 Argonaut, El Paso, Texas, at the time of the seizure."
>
> (Appendix E)

During the appeal to the Fifth Circuit, the Government followed the reasoning of its final arguments and of the Court's Finding of Fact No. 12, and contended that the appellant had overlooked the important proof contained in the search warrant affidavit.

> "Appellant has omitted to recite that the confidential informant told the agents that appellant was in possession of a quantity of heroin at his apartment, the subject of the affidavit, only two hours prior to execution of the search warrant. It is difficult to imagine a more recent connection in time between information provided by a confidential informant and observance of the actual facts by agents. The allegation by the confidential informant that John David Moore was the occupant of the apartment which was the subject of the search warrant was borne out by the agents' arrival within a two-hour time span (Tr. 18)."
>
> (Appendix F)

It also buttressed this testimony by reference to the allegations of other unidentified informants supporting the allegations in the search warrant. (Appendix F)

The Fifth Circuit affirmed the conviction with an opinion, (Appendix G) which was silent as to any fact or legal reasoning contrary to this Petitioner's position.

REASONS FOR GRANTING THE WRIT

(1) Whether An Accused May Be Properly Convicted Of Possession Of Narcotics Where The Evidence Revealed Only His Presence With Another At The Residence Where The Contraband Was Seized, Without Additional Showings Of Occupancy. Control, Or Other Affirmative Links.

The Petitioner contends that this defendant was convicted of possession of contraband on a showing of mere proximity. The only evidence which was presented which was competent and admissible on the question of guilt or innocence was the testimony of four police officers, the only witnesses produced by the Government. The testimony of the officers was as follows:

1. Agent Baden testified that he observed the entry into the apartment from a distance of approximately twenty yards (Tr. 19); but that he did not go in (Tr. 19), or participate in the search (Tr. 20).

2. Agent Uribe testified that he was not present at the apartment and did not go in at any time (Tr. 27). He made references to the surveillance conducted by himself and others of the apartment (Tr. 30, Tr. 31-35), but was not asked and did not answer any questions about the fruits of such surveillance.

3. Agent Contreras testified that he entered the apartment from the rear *after* the other officers had already entered (Tr. 42). He also testified that he observed Isabel Cuevas sitting on the couch and JOHN DAVID MOORE lying face down on the living room floor (Tr. 48).

4. Agent McWhorter testified that he participated in the search (Tr. 50) but did not elaborate as to the time or method of his entry into the apartment (Tr. 49-60). Agent McWhorter testified that both ". . . J. D. MOORE and young lady named Cueva . . . ," were present (Tr. 52). *He was then asked, "did you find any indication of ownership of the apartment?" He answered, "No, sir, I don't believe I did."* (Tr. 53) (Appendix B)

Agent McWhorter also referred to his participation in the surveillance, but was not asked, and did not answer any questions about the fruits of such surveillance (Tr. 53-60), besides his description of the photographs of the apartment complex and the outside of the apartment.

Conviction of possession on the meager evidence presented above runs directly contrary to the thrust of Fifth Circuit case law on that subject:

> " . . mere presence in the area where the narcotic is discovered or mere association with the person who does control the drug or property where it is located, is insufficient to support a finding of possession." *United States v. Stephenson*, 474 F.2d 1353 (5th Cir. 1973); Accord, *United States v. Martin*, 483 F.2d 974 (5th Cir. 1974).

No evidence was presented showing the appellant's actual possession of the contraband, and constructive presence may not be shown by mere presence. *Martin*, supra, at 974-975.

In addition, no evidence was produced to show that the appellant exercised any control of ownership over the premises, *United States v. Ferg*, 485 F.2d 914 (5th Cir. 1974). Regardless of the feelings and opinions of the agents and the prosecutor, absolutely no evidence such as utility bills, letters, clothing, rent receipts, initialled personal effects, or any similar items were introduced during the trial. Furthermore, no testimony was presented regarding the prior activity of Petitioner in or around the apartment. The Petitioner's conviction on such evidence, or lack of evidence, presents a compelling rationale for granting a Writ of Certiorari.

(2) Whether The Hearsay Tip Of An Unidentified Informer Contained In The Affidavit Of The Search Warrant May Properly Be Used By The Government In Its Final Argument For Conviction, And By The Court In Its Findings Of Fact And Amended Findings Of Fact Supporting Conviction, Especially In The Instant Case Where The Government Opposed Disclosure And The Court Denied Disclosure Of This Same Unidentified Informant.

Here the unexamined statements of the undisclosed informant were used squarely on the issue of guilt by the Government in its final argument (Appendix A), and its proposed Findings of Fact (Appendix C), and by the District Court in its Findings of Fact (Appendix D) and Amended Findings of Fact (Appendix E). Such use of hearsay allegations of undisclosed informants is violative of due process and the rights of confrontation. It is well settled that extra-judicial statements of an informer who did not confront the defendant in court may not be considered on the question as to guilt or innocence by Judge or jury. *Mersel v. United States*, 420 F.2d 517 (5th Cir. 1970), at Footnote 4; *Dennis v. United States*, 302 F.2d 5, 10 (10th Cir.); *La Placa v. United States*, 354 F.2d 56, 59 (1st Cir.), cert. denied, 383 U.S. 927, 86 S.Ct. 932, 15 L.Ed.2d 846.

One might be tempted to minimize the use of this hearsay testimony by the District Court in spite of its pervasive appearance at every stage and in spite of the fact that it furnishes the "missing link" necessary to a finding of sufficient evidence. However, given the fact that the Government opposed disclosure and the District Court denied disclosure of this informant, it is hard to see how even a "minimal" use on the question

of guilt would not run afoul of the confrontation clause or operate as a waiver of the Government's right of non-disclosure.

> "Nevertheless, the court is not unmindful of the fact that privilege cannot be used as both a sword and a shield. A party cannot choose to disclose only so much of allegedly privileged matter as is helpful to his case. 8 Wigmore, Evidence § 2327 (McNaughton Rev. 1961). Once the party begins to disclose any confidential communication for a purpose outside the scope of the privilege, the privilege is lost for all communications relating to the same matter." *Burlington Industries v. Exxon Corporation*, 65 F.R.D. 26 (1974) at 46.

Any use of the informer's allegations by the prosecution and by the Court on the question of guilt is clearly outside of the scope of the informer privilege.

Thus, we have a double error: first, the improper use of the testimony by the prosecution, and the Court: second, the refusal to disclose the informer's identity after such improper or attempted use waived the privilege of non-disclosure.

CONCLUSION

Narcotics cases continue to occupy a large portion of the Federal docket, and there is no doubt that narcotics abuse poses a grave danger to our society. The instant case involves heroin, the most dangerous narcotic of all; and not only does it involve heroin, but it involves a substantial quantity of heroin (192.5

grams). But much more importantly, it involves the due process clause of the Fifth Amendment and the Right to Confrontation Clause of the Sixth. In the cold black and white of the Constitution there is no exception for heroin; perhaps there should be, but there isn't.

In this case an informer's tip provided probable cause for a search, but the question is: Did it provide more? Did it provide the affirmative link which is lacking in the State's body of evidence? Common sense provided a connection between the informer's allegation and the defendant's presence at the apartment, but common sense is not legal sense. We know that we cannot allow conviction for mere presence; and we know, common sense aside, that undisclosed witnesses can never be witnesses on the issue of guilt or innocence, or even on the slimmest thread or connection involved in guilt or innocence. We know this because some 200 years ago we broke our ties with a kindred nation in part because that nation had no guarantees against such silent witnesses.

This is a hard case. Reversal goes against common sense and 192.5 grams of heroin. On the other hand, to fashion legal principles which would allow conviction in this case would seriously warp the thrust of the last two centuries of criminal law experience. The Fifth Circuit discovered one method of handling this case; it delivered an affirming opinion without facts or reasoning, stamped: "DO NOT PUBLISH." The Petitioner hopes and expects that this Honorable Court will choose a less easy but more enlightening approach.

Respectfully submitted,

JOSEPH (SIB) ABRAHAM, JR.
505 Caples Building
El Paso, TX 79901
Attorney for Petitioner

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing brief has been served upon opposing counsel of record by placing the same properly addressed in the United States Mail with adequate postage affixed thereto this ____ day of May, 1976.

APPENDICES

APPENDIX A

THE GOVERNMENT'S FINAL ARGUMENT IN *UNITED STATES v. JOHN DAVID MOORE*, CAUSE NO. EP-75-CR-82, BEFORE THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, EL PASO DIVISION.

MR. WALKER: "Your Honor, very briefly. I'll argue the facts of the case first and then to go the defendant's motions. I think the Government has shown beyond a reasonable doubt, way beyond a reasonable doubt that John David Moore did, in fact, reside at the Apartment No. 60, Building No. 7, of the Hill Country Apartments, and he was in possession of heroin.

And I say that because a confidential informant came to Detective Uribe and said, "I have information or I have — through personal observation, know that John David Moore resides at a certain apartment here in El Paso, Texas, and he is in possession of a certain amount of heroin."

The information was proven to be correct beyond a reasonable doubt, and I think proves the case beyond a reasonable doubt, because the agents went there, and they did, in fact, find John David Moore right there in the proximity of the heroin, in possession of the heroin right there in that apartment.

So somebody who did know told the agents, and they went there, and they did find the heroin. He's charged, I believe, with possession with intent to distribute the heroin, and I think the Government has proven that aspect of the case beyond a reasonable doubt by the hat box containing the bottle of lactose, the balloons and the balance scale which measures quantities in gram units which, as the Court knows, is a common unit of measure for the selling of heroin for distribution of heroin here in El Paso County.

More than one officer identified Mr. Moore as being the Mr. Moore who is here this afternoon as being the Mr. Moore who was found in the apartment on January 7, 1975.

We know that this apartment was a location used for the distribution of heroin, because information was received, as we know, from Mr. Uribe's testimony prior to January 7 that this was a location where heroin was being sold and a surveillance was performed by the officers, so that the apartment had at least come under suspicion as being the location for the distribution of heroin.

So I think the Government has proved their case beyond a reasonable doubt. We know that the substance found there was heroin by the chemist's report.

And as to the defendant's motion, Your Honor . . ."

(Emphasis supplied.)

APPENDIX B

TESTIMONY OF OFFICER McWHORTER CONCERNING AFFIRMATIVE LINKS BETWEEN DEFENDANT AND APARTMENT.

Q All right, sir. Did you find any indication of ownership of the apartment there, anything to indicate to you who might have rented the apartment or who occupied the apartment or who lived there?

MR. ABRAHAM: Your Honor, may it please the Court, I will object to that question. I think it calls for a conclusion on the part of this witness.

THE COURT: I'll sustain the objection, and rephrase your question.

Q Did you find any indication of ownership in the apartment?

MR. ABRAHAM: Your Honor, that's the question that I objected to.

THE COURT: Well, I understand that you object to it on the account it calls for a conclusion. He asked if he found any evidence, and I'll overrule your objection.

THE WITNESS: Could we get —

Q That you remember.

A Could I — could you repeat the question, please?

Q Yes. Did you find any indications of ownership of the apartment?

A *No, sir, I don't believe I did.*

(Emphasis supplied.)

APPENDIX C

THE GOVERNMENT'S PROPOSED FINDINGS OF FACT IN *UNITED STATES OF AMERICA v. JOHN DAVID MOORE*, NO. EP-75-CR-82.

(Title Omitted)

FINDINGS OF FACT

I. Apartment #60, Building #7, of the Hill Country Apartments, 213 Argonaut, El Paso, Texas, was under surveillance as a suspected heroin distribution point for at least 7 days prior to the arrest of the defendant in the above styled and numbered cause. Officers of the Drug Enforcement Administration Task Force, acting pursuant to a search warrant issued by the Honorable 65th Judicial District Court of the State of Texas, arrested JOHN DAVID MOORE and ISABEL CUEVA and confiscated a quantity of contraband. Information contained in the affidavit to obtain the search warrant was obtained from a confidential informant who had been in the apartment within 24 hours of the time the information was given. The information was told to Officers Edward Uribe and Alberto Aceves, together. Officer Aceves prepared the affidavit, incorporating the information provided by the confidential informant. Officer Uribe presented the affidavit to the Honorable Judge Edward Marquez, presiding, 65th Judicial District Court. Properties seized by virtue of the search warrant included approximately 5 ounces of brown heroin, contained in plastic bags, a quantity of rubber balloons, a quantity of Lactose powder, commonly used to dilute heroin for sale, and a balance beam scale graduated in gram measure-

ments, a common unit of measurement in heroin distribution. Upon entry of officers pursuant to the search warrant, JOHN DAVID MOORE was found in close proximity to the above mentioned heroin. *Information revealed by the confidential informant and relied upon in preparation of the affidavit disclosed that JOHN DAVID MOORE was the occupant of apartment #60, building #7, Hill Country Apartments, 213 Argonaut, El Paso, Texas.* The brown powder described in the affidavit and found pursuant to the search warrant was submitted to the Drug Enforcement Administration laboratory for an analysis.

CONCLUSIONS OF LAW

1. JOHN DAVID MOORE was the occupant of Apt. #60, building #7, Hill Country Apartments, 213 Argonaut, El Paso, Texas on January 7, 1975 at 5:00 P.M.

2. JOHN DAVID MOORE was in possession of the contraband confiscated pursuant to a search warrant executed at Apartment #60, building #7, Hill Country Apartments, 213 Argonaut, El Paso, Texas.

3. Five (5) ounces of brown heroin is a large amount of heroin and is sufficient for commercial purposes.

4. Lactose powder, commonly known as "milk sugar", rubber balloons, and balance beam scales, graduated in gram measurements, are common equipment and paraphernalia used in the preparation of heroin for commercial distribution.

5. The search warrant obtained by Drug Enforcement Administration Agents from the 65th Judicial District Court was a lawful search warrant, based upon sufficient probable cause, and was executed properly, pursuant to Federal Rules of Criminal Procedure. Certain failures in the return procedure occurred, because the defendants and the contraband seized were not brought before the issuing Magistrate, but were taken before a United States Magistrate. The procedural requirements of Rule 41(d), Federal Rules of Criminal Procedure are essentially ministerial in nature. *United States* v. *Hall*, 505 F. 2d 961 (3rd Cir. 1974).

6. The defendant has not demonstrated prejudice from the above mentioned violation of Rule 41, and for this reason the remedy of suppression of the evidence would not render a just determination of the instant proceedings.

SIGNED AND ENTERED this ___ day of July, 1975.

UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that I have on this 29th day of July, 1975, mailed copies of the foregoing Findings of Fact to:

Mr. Joseph (Sib) Abraham, Jr.
Suite 505
Caples Building
El Paso, Texas 79901

Frank B. Walker
Assistant U. S. Attorney
P. O. Box 74
El Paso, Texas 79941

(Emphasis supplied)

APPENDIX D

THE DISTRICT COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW IN *UNITED STATES OF AMERICA v. JOHN DAVID MOORE*, NO. EP-75-CR-82.

(Title Omitted)

Filed: August 12, 1975

FINDINGS OF FACT AND CONCLUSIONS OF LAW

On the 25th day of July, 1975, the right to trial by jury having been waived by Defendant in open Court, the cause was regularly called on the docket for hearing on Defendant's Motion to Suppress the evidence and for trial before the Court.

Thereafter, the Court having duly considered the evidence and the summation of counsel, and the Court

having duly considered the evidence and the summation of counsel and the applicable law hereby makes its Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1.

Apartment #60, Building #7, of the Hill Country Apartments, 213 Argonaut, El Paso, Texas, was under surveillance as a suspected heroin distribution point for at least seven days prior to the arrest of Defendant, John David Moore, on January 7, 1975, at 5:00 o'clock P. M.

2.

An Affidavit and Complaint for Search Warrant was made by Officer Edward Uribe. (Government Exhibit No. 1).

3.

The information contained in the Affidavit of Officer Uribe was obtained from a confidential informant who had been in Apartment #60, Building #7, of the Hill Country Apartments, within the 24-hour period immediately proceeding the time the information was given to Officer Uribe.

4.

The information given by the confidential informant was given to Officers Edward Uribe and Alberto

Aceves at the same time and in the presence of each other.

5.

Officer Aceves prepared the Affidavit (Government Exhibit No. 1), incorporating the information provided by the confidential informant.

6.

Officer Uribe presented the Affidavit to the Honorable Judge Edward Marquez, Presiding Judge, 65th Judicial District Court of the State of Texas, at El Paso, Texas.

7.

The Honorable Edward Marquez, Judge Presiding in the 65th Judicial District Court of El Paso County, Texas, issued a search warrant at 4:00 P. M. on January 7, 1975. (Government Exhibit No. 2).

8.

Officers of the Drug Enforcement Administration Task Force, acting pursuant to the search warrant issued by the Honorable Edward Marquez, Judge Presiding, 65th Judicial District Court, arrested John David Moore and Isabel Cueva and confiscated a quantity of contraband.

9.

Property seized by virtue of the search warrant included approximately five ounces of brown heroin,

contained in plastic bags (Government Exhibits 6 and 7), a quantity of rubber balloons (Government Exhibits 9 and 10), a quantity of Lactose powder, commonly used to dilute heroin for sale (Government Exhibit 10), a balance beam scale, graduated in gram measurements, a common unit of measurement in heroin distribution (Government Exhibit No. 8), and other narcotic paraphernalia (Government Exhibit No. 9).

10.

Upon entering Apartment #60, Building #7, of the Hill Country Apartments, 213 Argonaut, El Paso, Texas, officers found one plastic baggie containing heroin on the coffee table and one plastic baggie under the coffee table.

11.

Defendant, John David Moore, was found in close proximity to the abovementioned heroin.

12.

Information revealed by the confidential informant and relied upon in the preparation of the Affidavit disclosed that John David Moore was the occupant of Apartment #60, Building #7, Hill Country Apartments, 213 Argonaut, El Paso, Texas.

13.

The brown powder described in the Affidavit and found pursuant to the search warrant was submitted to

the Drug Enforcement Administration laboratory for analysis.

14.

The brown powder found as a result of the search warrant is heroin.

15.

If the official government chemist were called, qualified as an expert and sworn as a witness, he would testify that the substance referred to in the Indictment has been chemically tested and is heroin.

CONCLUSIONS OF LAW

1.

John David Moore was the occupant of Apartment #60, Building #7, Hill Country Apartments, 213 Argonaut, El Paso, Texas, on January 7, 1975, at 5:00 o'clock P. M.

2.

John David Moore was in possession of the contraband confiscated pursuant to a search warrant executed at Apartment #60, Building #7, Hill Country Apartments, 213 Argonaut, El Paso, Texas.

3.

Five ounces of brown heroin is a large amount of heroin and is sufficient for commercial purposes.

4.

Lactose powder, commonly known as "milk Sugar", rubber balloons, and balance beam scales, graduated in gram measurements, are common equipment and paraphernalia used in the preparation of heroin for commercial distribution.

5.

The search warrant obtained by Drug Enforcement Administration agents from the 65th Judicial District Court was a lawful search warrant, based upon sufficient probable cause, and was executed properly, pursuant to Federal Rules of Criminal Procedure. Certain failures in the return procedure occurred, because the defendants and the contraband seized were not brought before the issuing magistrate, but were taken before a United States Magistrate. The procedural requirements of Rule 41(d), Federal Rules of Criminal Procedure are essentially ministerial in nature. *United States v. Hall*, 505 F. 2d 961 (3rd Cir. 1974).

6.

The Defendant has not demonstrated prejudice from the abovementioned violation of Rule 41, and for this reason the remedy of suppression of the evidence would not render a just determination of the instant proceedings.

/s/ WILLIAM S. SESSIONS
WILLIAM S. SESSIONS
United States District
August 12, 1975 Judge

APPENDIX E

THE DISTRICT COURT'S AMENDMENT OF FINDING OF FACT NO. 12.

(Title Omitted)

NO. EP-75-CR-82

Filed: Nov. 17, 1975

NOTICE OF AMENDMENT TO FINDINGS OF FACT AND CONCLUSIONS OF LAW

Pursuant to Rule 36 of the Federal Rules of Criminal Procedure, the Court herein amends Finding of Fact No. 12 in the above styled and numbered cause to read as follows:

> 'Information revealed by the confidential informant and relied upon in the preparation of the affidavit disclosed that John David Moore was the occupant of Apartment 60, Building No. 7, Hill Country Apartments, 213 Argonaut, El Paso, Texas, at the time of the seizure.'

/s/ WILLIAM D. SESSIONS
United States District
Judge

APPENDIX F

THE GOVERNMENT/APPELLEE'S BRIEF TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT — PERTINENT PORTIONS OF POINT I RELATING TO THE ISSUE OF SUFFICIENCY OF EVIDENCE FOR CONVICTION.

"Applying these guidelines to the instant facts, *it is plain that the evidence is sufficient to sustain the Court's verdict. Appellant has omitted to recite that the confidential informant told the agents that appellant was in possession of a quantity of heroin at his apartment, the subject of the affidavit, only two hours prior to execution of the search warrant.* It is difficult to imagine a more recent connection in time between information provided by a confidential informant and observance of the actual facts by agents. The allegation by the confidential informant that John David Moore was the occupant of the apartment which was the subject of the search warrant was borne out by the agents' arrival within a two-hour time span (Tr. 18). Further, information was received by the agents twenty to thirty days prior to execution of the warrant that appellant's apartment and appellant were involved in the drug traffic. It is interesting to note that this information was received not only from the confidential informant who supplied affiants with their information, but from other sources, even from a different confidential informant (Tr. 30-32).

This fact situation can be distinguished from one where agents receive information for the first time, act quickly upon that information, and find a person present on the premises when a search warrant is executed. The possibility for error in such a situation is obvious. However, in the instant fact situation, information was received almost a month prior to execution of the search warrant that appellant was involved in drug trafficking out of the apartment named in the affidavit and the location was under surveillance during the entire period between receipt of the information and execution of the search warrant. *Also, the affidavit alleged that John David Moore, appellant, was the possessor of the contraband and the occupant of the apartment; appellant was not named as "others".* The Court found in its Findings of Fact that appellant was found in close proximity to the contraband and that in addition to the contraband, the agents seized a quantity of rubber balloons, lactose powder, a balance beam scale, and other narcotic paraphernalia (R. 55), (Tr. 50-52).

In *United States* v. *Rodriguez*, 498 F.2d 302 (5th Cir. 1974), this Court held:

> ". . . possession may be actual or constructive. Constructive possession exists when one has dominion and control over the drug. 'Such possession need not be exclusive, but may be shared with others, and is susceptible of proof by circumstantial as well as direct evidence.' *Garza* v. *United States*, 385 F.2d 899 at 901 (5th Cir. 1967)."

United States v. *Gomez-Rojas*, 507 F.2d 1213 (5th Cir. 1975); *United States* v. *Ferg*, 504 F.2d 914 (5th Cir. 1974); *United States* v. *Richardson*, 504 F.2d 357 (5th Cir. 1974).

It is plain that the Court concluded that the evidence was inconsistent with the hypothesis of the accused's innocence, *Warner*, supra, and that the inferences drawn from the facts supported the verdict, *Cartwright*, supra, and that there was substantial evidence upon which to base the Court's findings that the accused was guilty, *Blachly*, supra. This issue is without merit."

(Emphasis supplied)

APPENDIX G

United States of America, Plaintiff-Appellee,

v.

John David Moore, Jr., Defendant-Appellant.

NO. 75-3680

SUMMARY CALENDAR*

United States Court of Appeals,
Fifth Circuit.

March 9, 1976

Appeal from the United States District Court for the Western District of Texas.

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* Rule 18, 5 Cir., see Isbell Enterprises, Inc. v. Citizens Casualty Company of New York, et al., 5 Cir., 1970, 431 F.2d 409, Part I.

Before COLEMAN, GOLDBERG, and GEE, Circuit Judges.

PER CURIAM:

This appellant, tried to the Court without the intervention of a jury, was convicted of possession 169.5 grams of heroin with intent to distribute it, 21 U.S.C., §841 (a) (1). This appellant attack on the validity of the search warrant and upon the sufficiency of the evidence is without merit.

Accordingly, the judgment of the District Court is

AFFIRMED.

Stamped: DO NOT PUBLISH

APPENDIX H

In The
United States Court of Appeals
Fifth Circuit

Office of the Clerk

April 22, 1976

TO ALL COUNSEL OF RECORD

Re: 75-3680 — USA v. John David Moore, Jr.

Dear Counsel:

This is to advise that an order has this day been entered denying the petition ( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellant Procedure; Local Fifth Circuit Rule 12) the petition ( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH,
Clerk
/s/ SUSAN M. GRAVOIS,
Deputy Clerk

cc: Mr. Joseph Abraham, Jr.
Mr. Frank B. Walker

APPENDIX I

The following is a summary of the arguments, points of error, and questions raised below.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

ARGUMENT

Messrs. Roberts and Abraham, Counsel for the defendant John David Moore, argued for acquittal only and totally refrained from requesting a new trial (Tr. 75 et seq)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

POINTS OF ERROR FROM APPELLANT'S BRIEF

POINT I

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No. 75-1692

In the Supreme Court of the United States

OCTOBER TERM, 1976

JOHN DAVID MOORE, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,

RICHARD L. THORNBURGH,
Assistant Attorney General,

JEROME M. FEIT,
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OPINION BELOW

The *per curiam* opinion of the court of appeals (Pet. App. G) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on March 9, 1976, and a petition for rehearing was denied on April 22, 1976. The petition for a writ of certiorari was filed on May 22, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to support petitioner's conviction.

2. Whether the district court erred in refusing to order disclosure of an informant's identity.

STATEMENT

After a bench trial in the United States District Court for the Western District of Texas, petitioner was convicted of possessing heroin with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). He was sentenced to six years' imprisonment and to a special parole term of six years. The court of appeals affirmed in an unpublished *per curiam* opinion (Pet. App. G).

The evidence showed that on January 7, 1975, police officers received a tip from a reliable informant that petitioner and others were in possession of heroin at an El Paso, Texas, apartment. The police immediately obtained a search warrant and entered the apartment, where they found petitioner lying face down on the living room floor near a coffee table (Tr. 48). A balloon filled with heroin was on the table and a small bag of heroin was underneath the table (Tr. 46). Petitioner and another occupant of the room, Isabel Cueva, were arrested, and approximately five ounces of heroin, together with milk sugar, a scale, and other narcotics paraphernalia, were seized (Tr. 50-52).[1]

Prior to trial, petitioner moved to suppress the fruits of the search on the ground that the warrant had been issued without probable cause.[2] With petitioner's consent (Tr. 10), the trial judge consolidated the suppression hearing and the trial on the merits, stating that he would rely on counsel in final argument to "sort out" the evidence relevant to the motion to suppress from that admissible on the issue of guilt or innocence (Tr. 17).

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[1]The government dismissed the case against Cueva before trial.

[2]Petitioner also filed a pretrial motion for disclosure of the informant's identity.

The government then called several police officers, who testified that they had received information from a reliable informant concerning narcotics activities in an apartment in El Paso and had obtained a search warrant based on this information.[3] In addition, an officer testified that the informant's tip had been corroborated by information he had previously received from separate sources that petitioner "had quite a few gentlemen selling heroin for him" from his apartment (Tr. 30-32). Finally, the details of petitioner's arrest and of the seizure of the heroin were recounted (Tr. 46-52). Petitioner did not testify and called no witnesses on his behalf. At the conclusion of trial, the district court denied the motion to suppress and found petitioner guilty of possession of heroin, finding *inter alia* that "[t]he search warrant * * * was a lawful search warrant, based upon sufficient probable cause, and was executed properly" and that petitioner had been "found in close proximity to the * * * heroin" (Pet. App. 12a, 10a).

ARGUMENT

1. Petitioner contends (Pet. 6-8) that the evidence failed to demonstrate his actual or constructive possession of the heroin but showed only his "mere presence" in the area in which the contraband was found. Viewed in the light most favorable to the

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[3]The search warrant affidavit stated in part: "I [the affiant] have been informed of the following facts by a person who I know to be reliable, credible, and trustworthy, who stated the following: that John D. Moore and others whose names, descriptions and identities [are] unknown to him, have a quantity of heroin concealed in their apartment located at the above described location. That he (the informant) had been to Moore's apartment within the past 24 hours and had personally observed two clear plastic baggies containing brown powder on top of the kitchen table."

government (*Glasser* v. *United States*, 315 U.S. 60, 80), however, the officers' testimony that petitioner was discovered in the immediate vicinity of the unconcealed heroin was sufficient to support a finding of dominion or control. See *United States* v. *Turner*, 505 F. 2d 477 (C.A. D.C.), certiorari denied, No. 75-5724, January 12, 1976.[4] Contrary to petitioner's apparent contention (Pet. 8), the government was not required to prove petitioner's possessory or other interest in the apartment in order to convict him of possessing the narcotics that were alongside him upon his arrest.

Petitioner correctly notes that the trial court apparently relied upon evidence introduced on the motion to suppress to support its finding that petitioner was in constructive possession of the heroin. In particular, the court referred in its findings of fact to the informant's statement to the police (Pet. App. 13a) that petitioner was the occupant of the apartment at the time of the seizure. Although we agree with petitioner that reliance on this hearsay statement in determining petitioner's guilt or innocence

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[4]The circumstances of this case, we submit, offer a far stronger showing of constructive possession of the contraband than was presented in the cases upon which petitioner relies. In *United States* v. *Stephenson*, 474 F. 2d 1353 (C.A. 5), the only evidence of possession was the presence of the defendant's fingerprints on glassine envelopes that contained narcotics. As the court of appeals noted (*id.* at 1354), the fingerprints could have been placed on the envelopes "as long as a year before the seizure when the envelopes were empty." In *United States* v. *Martin*, 483 F. 2d 974 (C.A. 5), although the defendant had been present during conversations between her roommate and an undercover agent concerning a sale of drugs, there apparently was no proof that drugs were either present or within the defendant's reach at the time of the conversations. Finally, in *United States* v. *Ferg*, 504 F. 2d 914 (C.A. 5), the defendant was merely a passenger in the front seat of a vehicle in which narcotics were found concealed behind the rear seat.

was improper, it is clear that in the circumstances of this case any error was harmless. First, as previously noted, petitioner's guilt was clearly demonstrated beyond a reasonable doubt on the basis of the evidence properly admitted at trial. See *Kotteakos* v. *United States*, 328 U.S. 750, 764.[5] In addition, petitioner offered no evidence to rebut the testimony of the police officers, nor did he attempt to prove that his presence in the apartment was unrelated to the heroin. See *United States* v. *Frank*, 494 F. 2d 145, 153 (C.A. 2), certiorari denied, 419 U.S. 828. Particularly significant in this regard is petitioner's failure to call Cueva, who also had been present in the apartment at the time of the search. Moreover, petitioner agreed to a combined suppression hearing and trial and accepted the court's proposal that the evidence relevant to the respective issues should be sorted out in closing argument. At no point during closing argument, however, did petitioner seek to restrict the court's consideration of the hearsay evidence to the suppression issue. Cf. *United States* v. *Bey*, 526 F. 2d 851, 855 (C.A. 5); *United States* v. *Carney*, 468 F. 2d 354, 357 (C.A. 8). Finally, it is of course relevant to a determination of prejudice that petitioner's trial was by the court without a jury. *United States* v. *Empire Packing Co.*, 174 F. 2d 16, 20 (C.A. 7), certiorari denied, 337 U.S. 959.

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[5]Petitioner does not challenge the legality of the police officers' search of the apartment or of his arrest. On this record, such an argument could not be maintained, since the search warrant was properly issued on the basis of the recent, personal observations of criminal activity by a reliable informant. *Spinelli* v. *United States*, 393 U.S. 410, 416; *Aguilar* v. *Texas*, 378 U.S. 108, 114. Therefore, the officers' testimony concerning petitioner's constructive possession of the heroin at the time of his arrest was admissible.

2. Petitioner contends (Pet. 9-10) that the trial court compounded its error in considering the hearsay evidence by refusing to order disclosure of the informant's identity. For the reasons we have previously stated, any error in considering that evidence on the issue of petitioner's guilt does not warrant a new trial. Furthermore, the district court was not required to order disclosure of the informant's name in ruling on the motion to suppress. The test for determining whether an informant's identity should be revealed was outlined in *Roviaro* v. *United States*, 353 U.S. 53, 62:

> We believe that no fixed rule with respect to disclosure is justifiable. The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense. Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors.

Thus, *Roviaro* makes clear that the Court "was unwilling to impose any absolute rule requiring disclosure of an informer's identity * * *." *McCray* v. *Illinois*, 386 U.S. 300, 311. The striking of a proper balance between a defendant's demand for disclosure and the government's legitimate need for confidentiality is addressed to the sound discretion of the district court. See, *e.g.*, *United States* v. *Anderson*, 509 F. 2d 724 (C.A. 9), certiorari denied, 420 U.S. 910; *United States* v. *Bell*, 506 F. 2d 207, 215-216 (C.A. D.C.).

The trial judge did not abuse his discretion in this case. In upholding the validity of the warrant, the court was entitled to credit the "evidence submitted in open court and subject to cross-examination, that the officers

did rely in good faith upon credible information supplied by a reliable informant." *McCray* v. *Illinois*, *supra*, 386 U.S. at 305. Moreover, the confidential informant was not a witness to the offense of which petitioner was convicted (see *United States* v. *Clark*, 482 F. 2d 103, 104 (C.A. 5)), and his tip was not the only evidence relied upon by the police prior to the search. Information also had been received from other sources that petitioner was conducting a drug operation at the apartment (Tr. 30). In these circumstances, the court could properly conclude that the government's interest in maintaining the confidentiality of its informant outweighed any advantage that disclosure would have afforded petitioner in combating the showing of probable cause for the warrant.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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Solicitor General.

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Attorneys.

JULY 1976.

DOJ-1976-07

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1692

JOHN DAVID MOORE, JR.,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
For the Fifth Circuit

PETITIONER'S BRIEF IN REPLY TO THE UNITED STATES BRIEF IN OPPOSITION

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LIST OF AUTHORITIES

in Appendix D to the Petition For a Writ of Certiorari. The opinion of the Court of Appeals was not reported, having been stamped: DO NOT PUBLISH; however, this opinion appears in Appendix G to the Petition For a Writ of Certiorari. A copy of the order denying the Petition for a Rehearing en banc, entered April 22, 1976, appears in Appendix H to the Petition For a Writ of Certiorari.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on March 9, 1976. A Petition for a Rehearing en banc was timely filed and an order denying the Petition for a Rehearing en banc was entered on April 22, 1976. The Petition for Certiorari was timely filed within thirty (30) days of that date. This Court's jurisdiction is invoked under Title 28, United States Code, Section 1254(1).

QUESTIONS PRESENTED

I.

Whether an accused may be properly convicted of possession of narcotics where the evidence revealed only his presence with another at the residence where the contraband was seized, without additional showings of occupancy, control, or other affirmative links.

II.

Whether the hearsay tip of an unidentified informer contained in the affidavit of the search warrant may properly be used by the Government in its final argument for conviction; and by the Court in its Findings of Fact and Amended Findings of Fact supporting conviction, especially in the instant case where the Government opposed disclosure and the Court denied disclosure of this same unidentified informant.

CONSTITUTIONAL PROVISIONS INVOLVED

The following pertinent portion of the Fifth Amendment to the Constitution of the United States:

> "No person shall be . . . deprived of life, liberty, or property, without due process of law, . . ."

and the following pertinent portion of the Sixth Amendment to the Constitution of the United States:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . ."

REPLY TO THE ARGUMENT OF THE UNITED STATES

(1) Whether An Accused May Be Properly Convicted Of Possession Of Narcotics Where The Evidence Revealed Only His Presence With Another At The Residence Where The Contraband Was Seized, Without Additional Showings of Occupancy, Control, Or Other Affirmative Links.

A.

In dealing with the Petitioner's first question above, the Government proposed its legal theory of the case supported by a single precedent:

". . ., However, *the Officers' testimony that Petitioner was discovered in the immediate vicinity of the unconcealed heroin was sufficient to support a finding of dominion or control.* See *United States v. Turner*, 505 F.2d 477 (C.A.D.C.). certiorari denied, No. 75-5724, January 12, 1976" (Resp. 4) (emphasis supplied).

after examining *Turner*, the Petitioner discovered that it was a totally false precedent for two completely different reasons. First, *Turner* is a decision without opinion which is contained in a table of such opinions, and it is followed by an asterisk (*). Turning to 505 F.2d 475 where the asterisk (*) is explained reveals just what sort of precedent *Turner* really is.

"An asterisk identifies those cases where the judgment or order is accompanied by a memorandum explanatory of the judgment. Such memorandum is not included with the opinions of the Court that are printed, *and it may not be cited in Briefs or memorandum of counsel as precedents,* under Local Rules 8(b)." 505 F.2d, at 475 (emphasis supplied).

The second reason that *Turner* is not a valid precedent is found in the memorandum mentioned above.

"As to Turner's conviction, the sufficiency of the evidence is established by the location of the shopping bag underneath the right front seat where he was sitting, together with the officer's testimony that Defendant's head and shoulders disappeared from view. While it is

conceivable this disappearance was caused by the structural characteristics of the car blocking the officer's vision as he approached the right front door, *the more likely thrust of the testimony is that there was a concealment movement.*" (emphasis supplied)

Memorandum (not cited as precedent) filed in *United States v. Randolph Turner*, Cause No. 73-2139, United States Court of Appeals for District of Columbia (September Term 1974); result listed in table in 505 F.2d 477 (C.A. D.C. 1975); certiorari denied, No. 75-5742, January 12, 1976.

So in *Turner*, we have (1) the contraband located directly under the seat of the accused, and (2) an act of concealment or dominion. This is clearly sufficient for a showing of constructive possession and clearly insufficient as a precedent in *Moore* where there was only the Petitioner's presence, not alone, without any affirmative evidence of relationship to the premises, the contraband, or another in possession. Thus the use of *Turner* as precedent in this case not only contravenes the Local Rules of the D.C. Circuit, but also seriously warps the thrust of *Turner's* facts.

The rule in D.C. Circuit is directly opposite from that portrayed by the Respondent. The leading case in the D.C. Circuit is *United States v. Holland*, 445 F.2d 701 (1971), recently followed and cited by that Court in *United States v. Watkins*, 519 F.2d 294 (C.A.D.C. 1975).

The *Holland* case concerned facts almost identical to *Moore*. In *Holland*, the contraband was "on top of a

dresser," and when the police entered, they found a woman and the Appellant . . ." in the room that contained the dresser. *Holland*, at 703. In dealing with the above facts, Chief Judge Brazelon dealt directly and forthrightly with the difficult problem of possession:

> "Appellant may have known about the heroin, she may even have used it in his presence, but more is required before Appellant can be said to possess the heroin himself.
>
> "It is perfectly true that this Appellant may be guilty. The trouble with absence of evidence is that it is consistent with *any* hypothesis." *Holland*, at 703. (emphasis in original).

The *Holland* Court went on to point out where the Government had failed to prove its case.

> "We must remember that constructive possession means being in a position to exercise dominion or control over a thing. (footnote omitted) Such a position should not be lightly imputed to one found in another's apartment or home. If an inference of constructive possession must be made, the jury must have before it information about the regularity with which the person in question occupied the place and about his special relationship with the owner or renter.
>
> "[2] The necessary background information is strikingly absent in this case. The Government claims that the presence of men's clothes

> in the apartment contributes to the conclusion that appellant's presence was 'neither fortuitous nor brief, but residential,' but did not offer proof that the clothes in question belonged to or even fit appellant. For all the Government has shown, appellant may be guilty of no more than an illicit relationship." *Holland*, at 703.

In *Moore* we have an even greater failure to produce convicting evidence in the Courtroom. In *Moore* we lack evidence of:

(1) Ownership of the apartment;
(2) Residence in the apartment;
(3) Length of stay by Petitioner or Cueva before search;
(4) Personal effects of any party;
(5) Fingerprints on contraband or scattered in the apartment so as to show occupancy;
(6) Bills, receipts, or any other papers of any party;
(7) And, of course, any evidence of actual possession or control by any party or association with that party in possession.

No evidence relating to these elements were introduced at the trial. In fact, the only testimony as to evidence of residency or occupancy received a negative reply.

Q. "Yes. Did you find any indication of ownership of the apartment?"
A. "No, Sir, I don't believe I did." (TR 53)

The only personal item mentioned in the testimony was the sort that could easily be associated with a woman.

> Q. "Could you tell the Court what you found?"
> A. "I found a scale, a gram scale and also a — what appeared to be a hat box or some kind of make up box containing syringes and some balloons." (TR 50)

In Holland, the lady present pleaded to lesser offenses; in *Moore*, the Government dismissed the charges against Cueva. Can the suspicions and hunches of the police and the prosecutor make up for the lack of evidence against the one they choose to prosecute; can prosecutorial discretion determine who is to be adjudged innocent and who is to be adjudged guilty?

B

The Respondent also made a point of demanding cases involving knowledge of contraband or at least unconcealed contraband. Besides, *Holland, Supra.*, there are a plethora of such cases. A recent case in the Fifth Circuit is *United States v. Maspero*, 496 F.2d 1254 (C.A. 5 1974). There the Court delivered a plainly worded opinion on this very issue:

> "We reach a different conclusion with respect to Ruiz. He was present in the driveway of the Maspero home when the tractor-trailer pulled in. But mere presence in the area of contraband or awareness of its location is not sufficient to establish possession." *Maspero*, at 1359.

(2) Whether The Hearsay Tip Of An Unidentified Informer Contained In The Affidavit Or The Search Warrant May Properly Be Used By The Government In Its Final Argument For Conviction, And By The Court In Its Findings Of Fact And Amended Findings Of Fact Supporting Conviction, Especially In The Instant Case Where The Government Opposed Disclosure And The Court Denied Disclosure Of This Same Unidentified Informant.

It is usually nearly impossible to demonstrate that a Trial Court has improperly considered hearsay evidence admitted solely for the purpose of determining probable cause for a search. This case is different, use of such testimony appears both in the Court's *Findings of Fact*, (Pet. App 10A), and even more clearly in its *Notice of Amendment to Findings of Fact*, (Pet. App 13a). The Government conceded this point in its brief in opposition:

> "Petitioner correctly notes that the trial court apparently relied upon evidence introduced on the motion to suppress to support its finding that petitioner was in constructive possession of the heroin. In particular, the court referred in its findings of fact to the informant's statement to the police (Pet. App. 13a) that petitioner was the occupant of the apartment at the time of the seizure." (Resp. 4)

The Government went on to concede that this use was improper, (Resp. 4) but defended that use by maintaining that it was harmless error. In this admittedly close question of possession, how can a significant piece of evidence relating to control of the premises be deemed harmless? How can a finding which the trial court felt was important enough to include in its original and amended findings of fact be considered harmless? The Government also makes the point that the defense waived any objection to the use of this testimony on the merits by allowing the Court to carry the Motions to Suppress and to Disclose, and not instructing the Court to disregard the informant's hearsay remarks to police as to the guilt or innocence. Is that really the burden of the defense counsel? Regardless of the answer, that question brings us to the heart of this matter. The Petitioner's argument is simple: that his position before trial, during trial, and after trial was that the informant's testimony *should* have been utilized by the Court and respective counsel on the issue of guilt or innocence. The Petitioner filed a motion to disclose this informant and compel him to testify and be cross-examined on the merits before trial (R-36). The Petitioner argued in his closing argument that this informant should be disclosed and heard from on the merits (R-75). After the trial, the Petitioner filed a supplementary brief in which he again pleaded with the Court to disclose the informant so that he could be examined on the issue of possession. (R-51) The Prosecution and the Trial Court took these motions and arguments to heart, at least half-heartedly. The Government strenuously argued for conviction using the informant's testimony as the cornerstone of his argument (TR 71-72, reproduced in Pet. 1A). Following this line, the Court utilized this in-

formant's testimony in its findings of fact dealing with occupancy (Pet. at 10A and as amended at 13A). So we see that the Court and the Government agreed with the defense that this informant should be a witness as to the guilt of the accused; their disagreement was with the defense contention that the accused should have equal access to this unseen witness whose testimony was convicting him. The Government vigorously opposed this in omnibus answers (R-10), followed by a formal motion in opposition to disclosure (R-40); and the Court agreed, never ordering such disclosure. Thus, the informant became the perfect prosecution witness, both a sword and a shield. The Government defended this refusal to disclose in its brief, (Resp. 6), by citing the landmark case of *Roviaro v. United States*, 353 U.S. 53, 77 S.Ct. 623, 1 L.Ed. 2d 639. *Roviaro* holds and the Government argues that disclosure of the informant is not required on a probable cause question. The Petitioner agrees, but this is not the question. The question is whether disclosure of the informant is required in a case where the Government uses the informant's hearsay remarks to argue for conviction (TR 71-72) and the Trial Court uses these same remarks in its findings of facts supporting conviction. (Pet. App 13A). In this situation, *Roviaro* cuts the opposite way.

> "Where the disclosure of the informer's identity . . . is essential to a fair determination of the cause, the privilege must give way." *Roviaro*, 353 U.S. at 61.

There is no question as to the inherent unfairness of a criminal proceeding which denies the accused the opportunity of cross-examination or even knowledge

of the name of a principle witness against him. Because of the closeness of the issue of possession, who can say that this witness was "harmless?" However, does not the Sixth Amendment guarantee cross-examination of even "harmless" witnesses?

This Court talked about the Sixth Amendment in a Texas case, *Pointer v. Texas*, 380 U.S. 400, 85 S. Ct. 1065, 13 L.Ed.2d 923:

> "There are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal."

Pointer holds that confrontation is ". . . essential . . ." and ". . . fundamental . . ." to a ". . . fair trial . . ."; *Roviaro* holds when the privilege of non-disclosure runs against what is ". . . essential . . ." to a ". . . fair determination . . . ," the privilege must give way. This is the Petitioner's position.

FINAL ARGUMENT AND CONCLUSION AS TO WHY A WRIT OF CERTIORARI SHOULD BE GRANTED

This case presents clear and compelling reasons for the granting of writ of certiorari. First of all, there are no major fact disputes. Looking at the briefs of the respective counsel at trial, before the Fifth Circuit,

and before this highest Court demonstrates a rather remarkable agreement as to the facts of this case. This case is not a muddle of conflicting testimony and evidence; it is a case of two questions of law. The first of these legal issues can be summarized as follows:

> MAY AN INDIVIDUAL BE CONVICTED OF POSSESSION OF CONTRABAND BY EVIDENCE SHOWING HIS PRESENCE IN AN APARTMENT LIVING ROOM TOGETHER WITH ANOTHER PERSON, IN THE PRESENCE OF UNCONCEALED CONTRABAND, WITHOUT A FURTHER SHOWING OF SOME AFFIRMATIVE ELEMENT SUCH AS CONTROL OR RELATIONSHIP WITH THE PREMISES OR WITH ANOTHER IN POSSESSION?

The above question relating to possession of contraband is obviously of great importance especially given the trend and tenor of modern society. Besides the relatively ancient prohibition against the possession of stolen goods, fruits of crimes and the like, we now have an ever increasing array of forbidden items including hundreds of chemical substances. It is vitally important to American people to know what possession is. Whether it is active relationship requiring affirmative control or relation; or whether it is a passive relationship which could occur through simply standing in an associate's living room and viewing the object. This is the question that the Petitioner asks this Honorable Court to address itself to.

The second question of law can be summarized as follows:

MAY THE PROSECUTION REFUSE TO DISCLOSE AN INFORMANT'S IDENTITY WHILE UTILIZING THAT INFORMANT'S HEARSAY TESTIMONY TO ARGUE FOR CONVICTION?

MAY A TRIAL COURT REFUSE TO ORDER DISCLOSURE OF AN INFORMANT'S IDENTITY WHILE UTILIZING THIS INFORMANT'S HEARSAY TESTIMONY IN ITS FINDINGS OF FACT TO SUPPORT CONVICTION?

It is the Defendant's contention that the above procedure violated his due process rights under the Fifth Amendment (Pet. 2) and his rights of confrontation under the Sixth Amendment (Pet. 3). This case represents an ideal vehicle for review under a writ of certiorari. The improper use of the informant's hearsay testimony is not mere conjecture or supposition; it affirmatively appears in the record of the case, and has been admitted by the Government in its brief in opposition (Resp. 4). On the other hand, the record clearly shows that the Petitioner pushed his demand for disclosure and examination of the informant on the merits of the case. The Petitioner did this before trial with his motion (R-36) and brief (R-38), during trial in his closing argument (TR 75), and after trial in his supplementary brief (R-51). He also presented his argument and authorities relating to that issue before the United States Court of Appeals for the Fifth Circuit in his appellate brief (Pet. App 19a), his supplementary brief (Pet. App 20a), and his brief for rehearing (Pet. App 21A). The Petitioner now finds himself before the highest Court in the land, his Court of last resort. The facts and issues are clear, but the question

that remains is whether this issue raised by the Petitioner is important enough to deserve consideration by this honorable and august body. The question of unseen and unexamined witnesses is not a novel one, but can we go on to say that procedures held in disfavor since the Star Chamber do not merit review? There is always the possibility that this Petitioner is guilty, as Chief Brazelon remarked in *Holland, Supra.*, and we must remember that some five ounces of heroin are involved. However, can we say that five ounces of heroin weighs more heavily in the scales of justice than our Constitution and Bill of Rights?

The Fifth Circuit answered the above questions with silence in a conclusory opinion which did not even mention the issue of disclosure (Pet. App 16a). The Petitioner confidently looks forward to hearing the voice of the Law on his case, and urges this Court to grant his petition for a writ of certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing brief has been served upon opposing counsel of record, Robert H. Bork and Richard L. Thornburgh, by placing the same properly addressed in the United States Mail with adequate postage affixed thereto this ____ day of September, 1976.

JOSEPH (SIB) ABRAHAM, JR.